

file

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of)	
General Harold A. Kissinger for Water)	
Quality Certification to Place Fill in a)	Case No. 3-NW-94-58049
Wetland for Residential Construction in the)	
Town of Sand Lake, Sawyer County)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on June 5, 1995, at Hayward, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge (ALJ), presiding.

In accordance with Sections 227.47 and 227.53(1)(c), Stats., parties to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

Lieutenant General Harold A. Kissinger
RFD 1, Box 84
Stone Lake, Wisconsin 54876-0084

FINDINGS OF FACT

1. Lieutenant General Harold A. Kissinger, RFD 1, Box 84, Stone Lake, Wisconsin, 54876, filed an application with the Department of Natural Resources for water quality certification pursuant to § 401, Federal Clean Water Act, and Ch. NR 299 and 103, Wis. Adm. Code.

2. Water quality certification was sought for the filling of 0.035 acres of a .10 acre wetland for a driveway access to a proposed residence located in Government Lot 10 of Section 8, Township 38 North, Range 9 West, Town of Sand Lake, Sawyer County, Wisconsin.

3. On December 12, 1994, the Department of Natural Resources denied the application finding that the proposed project was not wetland-dependent and that practical alternatives existed which would not adversely affect the wetland.

4. On December 29, 1994, the Department received a request for a contested case hearing on the Department's denial of water quality certification.

5. On January 16, 1995, the Department granted the request for a contested case hearing.

6. The proposed project is located at Fire No. 2995 Connors Lane, Town of Sand Lake, near Sissabagama Lake in Sawyer County, Wisconsin. The proposed activity would involve filling of a small depression that has been subject to ponding using on-site upland fill from an existing knoll on the property. The project would level off a small low-land area using approximately 170 cubic yards of on-site upland fill.

7. The parties dispute whether the small wetland area was artificially or naturally created. From the record, it seems likely that the low area of the proposed fill was in fact subject to some standing water for many years, which became much more pronounced with the construction of Connor's Lane in 1968. Construction of this road blocked natural runoff in the area. The result has been creation of the small ephemeral pond that can be seen in Exhibit 19. It must be noted that for purposes of its jurisdiction the DNR has consistently had a policy that it does not matter if the wetland was naturally or artificially created. This is consistent with Federal practice and precedent on this issue. See: § 404, 33 U.S.C.A. § 1344; Abenaki Nation of Mississiquoi v. Hughes, 805 F.Supp. (D. Vt. 1992), affd. 990 F.2d 729 (2nd Cir. 1993) and Leslie Salt Co. v. US, 896 F.2d 354 (9th Cir. 1990). However, the record supports a finding that this area is a natural wetland that was rendered more wet by road construction over twenty-five years ago.

The applicant disputes that the area is even a wetland within the meaning of Wisconsin law. However, from the record, it is clear that some portion of the proposed fill area, including the small ephemeral pond, is a low wetland area which is separated from a larger wetland area on the other side of Connors Lane. Vegetation at the project site includes common wetland species, including *carex stricta*, duck weed, alders and other various sedge species. DNR area water management specialist, Todd Naas, was able to identify a clear water mark in the area near the proposed project which establishes that there is frequently standing water in the area. The applicant demonstrated that September, 1994, was the wettest September on record. He argued that this fact contributed to the creation of any wetland areas. However, Mr. Naas provided undisputed expert testimony that the wetland plant species would not have established themselves within a matter of months after the unusual rain event. Further, a review of aerial photos undertaken by Lois Stoerzer identified wetlands in the area as early as 1938 and 1963. (Ex.23) Finally, the applicant admits that a small low-land depression area has held water since the road was constructed over twenty-five years ago.

A clear preponderance of the credible evidence indicates that a portion of the proposed fill area is wetlands within the meaning of Wisconsin statutes because water is at or

near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation, specifically known obligate wetland plant species.

8. The purpose of the proposed project is creation of a driveway access to Lot 2 for construction of a single-family dwelling and garage. The proposed fill project is not wetland-dependent because a driveway does not require location in and adjacent to surface waters or wetlands to fulfill its basic purpose. The applicant argues that his basic project purpose is construction of a lake-front executive quality single family home and that the driveway fill is needed to achieve this purpose. However, the Department and Federal regulators have all consistently defined project purpose much more restrictively to mean the purpose of the proposed fill area. There is no question that construction of a driveway is not a wetland dependent activity under Wisconsin law.

9. The parties dispute whether or not there are reasonable alternatives to the project as proposed. Several of the alternatives suggested by the Department are impractical or conflict with other environmental zoning regulations. For example, the Department suggested that the applicant instead make use of an existing un-paved nine-foot wide lane that is much closer to the lake and that is within county zoning set-back requirements. The applicant does not believe that county zoning officials would grant the variance to set-back requirements that the Department suggests that he seek. Further, the applicant demonstrated that to do so would result in a significant loss of tree cover, and thus wildlife habitat, in and around the project area. Plainly, some of the suggestions of the Department would appear to result in "other significant environmental consequences" unrelated to the loss of wetlands.

Nonetheless, the applicant has not carried his burden of proof in demonstrating that there are no practical alternatives to fulfill his basic project purpose of providing access to a single family dwelling. The Department established that the existing three lots could have been subdivided in a manner which did not require the filling of wetlands. The applicant agreed that it would have been possible to develop a lot to the north of the existing home on the middle lot north of the proposed project site. (See: Ex.9) This may well have resulted in a smaller lot and a smaller home as the applicant argues, nonetheless the basic project purpose of constructing a single family dwelling proximate to Sissabagama lake would be served. To pursue relocation of the present Lot 2 to avoid filling the wetland area would involve undertaking a new survey, an option that is available and capable of being implemented after taking into consideration cost, available technology and logistics in light of overall project purposes.

Further, the General admits that he could build on the lot as it is currently subdivided without filling any wetland area but would have to either build an underground or detached garage or eliminate the proposed two-car garage altogether. (Ex.1)

Finally, it must be noted that the applicant owns over 3000 feet of frontage on Lake Sissabagama. There are numerous other suitable sites within his domain and control that

would not involve the filling of even such a small area of wetland. The most obvious of these is Lot One just north of the instant site. The law is clear in requiring that such an available alternative should be used before the instant wetland area can be filled. Indeed, Federal courts have found that an applicant show why it could not acquire new property before finding that the applicant had carried its burden of proof that there were no available alternatives. Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988), cert. denied, 109 S.Ct. 1556 (1989).

Taken as a whole, a clear preponderance of the credible evidence supports a finding that the applicant has not carried his burden of proof in proving that there are no practical alternatives available which will not adversely impact wetlands or result in other significant adverse environmental consequences.

10. Because the applicant has not carried his burden on the alternatives issue, the ALJ does not need to reach the issue of whether or not the proposed fill would have a significant impact on wetland functional values. § NR 103.08(4)(a). However, for purposes of any appeal of this decision, the ALJ hereby summarizes the current status of the record on this issue. In summary, the evidence was that the project would have some detrimental impact on wetland functional values of an extremely small, low-quality wetland. However, because many of the essential functions of a wetland complex are rated at this site as low or not applicable, the ALJ would find that the project proponent has shown that no significant direct adverse impacts to the functional values of wetlands, water quality or other environmental consequences would occur as a result of the proposed fill.

Naas rated the significance of the functional values of this small wetland area to be low on a scale of low/medium/high or exceptional. Naas rated the significance of floral diversity at the site as low. Naas rated the significance of water quality protection from the wetland to be low. Naas rated the significance of groundwater protection as low. Naas rated the significance of aesthetic recreational or educational value of this tiny plot of wetland as low as well.

Further, Naas stated that the wetland area does not provide fishery habitat, flood or storm water attenuation, nor shoreline protection. These all are important functions of a typical wetland complex.

The only functional value that Naas rated as "medium" was the area's significance as wildlife habitat. In this regard, it must be noted that across Sissabagama Lake is a large tract of Sawyer County Forest lands. Further, the DNR indicated that General Kissinger has an established track record in maintaining natural areas in and around Sissabagama Lake.

Given the current status of the record on this issue and particularly given the low and not applicable rating given to the functional values, if the ALJ were to reach this issue he would find that the direct detrimental impacts from the proposed fill to wetland functional

values, water quality and the environment would not be "significant" within the meaning of § NR 103.08(3)(b).

11. Because there are alternatives available to the applicant which do not involve the filling of wetlands, the ALJ does not need to reach the issue of detrimental cumulative impacts attributable to the proposed activity which may occur, based upon past or reasonably anticipated impacts or wetland functional values of similar activities in the affected area. NR 103.08(03)(d). However, for purposes of any appeal, the ALJ will summarize the record on this issue.

Naas testified that the Department was concerned about the cumulative impact of filling other small ephemeral ponds if water quality certification were granted in this case. (See, also, Ex.22) Naas testified that the cumulative impacts of similar unnecessary wetland filling projects would include loss of fish and wildlife habitat, natural scenic beauty, flood storage, and increased ground water and surface water pollution. Clearly one purpose of the existing regulatory scheme is to avoid the cumulative impacts on small wetland areas across the state when there are reasonable alternatives available. Taken as a whole, the ALJ finds that the current status of the record is that detrimental cumulative impacts to the functional values of wetlands would occur with approval of the water quality certification. Under these circumstances, the applicant has not carried his burden of proof that the proposed project would not result in violation of the standards contained in NR 103.08(3)(d), Wis. Adm. Code.

12. The subject property is not located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Adm. Code.

13. Because other alternatives that do not involve the filling of wetlands are available to the applicant, it is not necessary to reach the issue of conditions of any water quality certification. However, for purposes of any appeal, the ALJ will summarize the record in this area. Naas testified that if the project were approved, that he would like to see the following conditions in any granting of the water quality certification: 1. That best erosion control measures be implemented during construction; 2. That if the proposed fill area bisects any wetlands that culverts be provided at crossing points to allow for the exchange of water.

DISCUSSION

This is a unique and difficult case for several reasons. First, the small ephemeral pond has very limited functional value as a wetland. This small wetland area contributes little to either water quality or the environment in the area. Second, there are practical alternatives to filling the pond which would serve the applicant's basic project purpose of constructing a single family dwelling close to Sissabagama Lake. Third, the case demonstrates a tension between § NR 103.08(4)(a) and (b), Wis. Adm. Code. Because the

outcome of the case relates to the understanding of this tension, the ALJ will address this issue first.

Sub. (a) seems designed to limit the Department's screening of water quality certification applications to go no farther if a practical alternative to the wetland site exists. Sub.(a) requires that the Department "shall make a finding that the requirements of this chapter," meaning the whole of NR 103, "are not satisfied when it determines that" 1.) An activity is not wetland dependent, and 2.) a practicable alternative exists which will not result in other significant adverse environmental consequences. On its face sub.(a) requires a finding that the requirements of NR 103 are not satisfied in this case because the project is not wetland dependent and a practical alternative to the proposal exists.

From a policy perspective, the Department does not want to have to undertake extensive analysis of wetland functional values where practical alternatives exist. This is consistent with the equivalent Federal regulations. (40 C.F.R.230.10) One law review commentator has stated as follows: "If a practical alternative is identified, the guidelines clearly intend that the project be located at the alternative site, thus making the other three requirements moot." Note, Practical Alternatives Under Section 404 Of The Federal Clean Water Act After Bersani v. Robichaud, 41 Syracuse L.Rev.813, 815-16 (1990). It should be noted that the Department cites compliance with the Federal Clean Water Act as being its central purpose in creating water quality standards. See: NR 299.01(1) and (2)

However, there is a tension between par.(a) and par.(b) which is a result of the confusing but ultimately intelligible language employed by its drafters. Sub.(b) of NR 103.08(04) states that for activities that do not meet the conditions of sub.(a) the department should consider the other factors in NR 103.08 (3)(b) to (f), which include a consideration of the functional values of the proposed fill area as a wetland. Further, sub.(b) goes on to require that "If it is determined that significant adverse impacts will not occur, the department shall make a finding that the requirements of this chapter are satisfied." The question turns on the interpretation of what constitutes "the conditions" of sub.(a) and, more precisely, when those conditions are not met. The issue is confusing because the code is loaded with double negatives and because it would be easy to confuse "the requirements of this chapter" (NR 103) with "the conditions in par.(a)." The ALJ finds as a matter of law that those conditions are 1.) An activity is not wetland dependent, and 2.) that a practical alternative exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences. Accordingly, those conditions are not met when an activity 1.) is wetland dependent, and 2.) there is no practical alternative as described above. The ALJ is authorized to get to the other issues relating to wetland functional values and the other provisions of NR 103.08(3)(c) to (f) only when these two conditions are met. Therefore the ALJ must find as a matter of law that the overall requirements of NR 103 are not met in this instance because the project is not wetland dependent and because the applicant has not shown that practical alternatives not affecting wetlands exist. While the ALJ is sympathetic to the position of the applicant in this matter,

it would exceed the authority expressly given or necessarily implied to the Division to go beyond the four corners of § NR 103.08(4)(a) that "the requirements of this chapter are not satisfied" under these circumstances.

Further, the applicant has not carried his burden of proof as to detrimental cumulative impacts across the state from the filling of other small wetland areas. In fairness to both parties, it may be that neither side fully developed its record on the issue of direct and cumulative impacts to the functional values of wetlands and the other standards in § NR 103.08(3) because these issues are not reached when there are reasonable alternative sites available. If this matter is reversed upon appeal, it may be appropriate to remand for further testimony on these issues. On the current record, the applicant has not carried his burden of proof and the permit application must be denied.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to § 227.43(1)(b), Stats. and NR 299.05(6), Wis. Adm. Code.

2. The proposed driveway fill is not a wetland dependent activity within the meaning of § NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Adm. Code., Wis. Adm. Code because construction of the driveway is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. Practical alternatives to the driveway proposal exist which will not adversely impact wetlands and will not result in other significant environmental consequences. § NR 103.08(4)(a)(2) Wis. Adm. Code. Practical alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. § NR 103.07(1), Wis. Adm. Code. Taking the above factors into consideration, the applicant has not shown 1.) why he could not construct a home proximate to Lake Sissabagama at another location along his 3000 feet of lake front property, including Lot 1 just north of the proposed fill location; or 2.) that he could not subdivide his lots in another manner that would serve his basic project purpose without adversely impacting wetlands.

4. The project does not meet the requirements of § NR 103, Wis Adm. Code because the project is not wetland dependent and because practical alternatives which will not adversely impact wetlands and will not result in significant adverse environmental consequences. § NR 103.08(4)(a), Wis Adm. Code.

5. The proposed project meets the conditions of in par. (a) because it is 1.) not wetland dependent , and because 2.) a practical alternative exists as described above. For all

activities which do not meet the conditions in par.(a), the department, utilizing the factors in sub. (3)(b) to (f), shall determine whether the project proponent has shown that the activity will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences. The ALJ does not reach this issue because the project meets the conditions in par.(a).

6. For purposes of a clear record on appeal, the ALJ makes the following Conclusions of Law. If the ALJ were to reach the provisions NR 103.08(4)(b), he would rule that the proposed project could result in the violation of the standards contained in NR 103.08(3)(b) to (f), Wis. Adm. Code, specifically, NR 103.08(3)(b) relating to practical alternatives and NR 103.08(3)(d) relating to cumulative impacts.

7. The subject property is not located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Adm. Code.

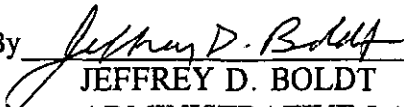
8. The Division of Hearings and Appeals has the authority pursuant to NR 299.05, Wis. Adm. Code, to deny, modify or approve a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in NR 299.04, Wis. Adm. Code.

ORDER

IT IS HEREBY ORDERED, that water quality certification be DENIED because there are other available alternatives which would not involve filling of wetlands.

Dated at Madison, Wisconsin on June 30, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE .

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.